

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of the Commission's Rules)
Regarding Installment Payment Financing for)
Personal Communications Services (PCS))
Licenses)
)
Order on Reconsideration of the Fourth Report)
and Order)
)

WT Docket No. 97-82

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

**OPPOSITION OF NEXTWAVE PERSONAL COMMUNICATIONS INC. AND
NEXTWAVE POWER PARTNERS INC. TO PETITION FOR RECONSIDERATION OF
US WEST WIRELESS, LLC, AND SPRINT SPECTRUM L.P. DBA SPRINT PCS**

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April 17, 2000

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NextWave Personal Communications Inc. and NextWave Power Partners Inc.
(collectively "NextWave"), through their undersigned attorney, submit the following opposition
to the petition for reconsideration filed by U S WEST Wireless, LLC ("U S West") and Sprint
Spectrum L.P. dba Sprint PCS ("Sprint") (collectively "petitioners").

The Sprint/US West petition is the latest in a series of procedurally improper attempts to
evade Congress' command that the Commission "*ensure*" that small businesses "are given the
opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D)
(emphasis added); *see also id.* § 309(j)(3)(B); § 309(j)(4)(C). Unhappy with the pro-small-
business policy judgments embodied in § 309 and the Commission's implementing regulations, a
number of large wireless providers, including Nextel and SBC, recently joined forces to ask the
Commission to waive the Commission's designated entity rules. In opposing that suggestion,
Sprint (and others) argued forcefully and correctly that waiver was an improper procedural

mechanism for bringing about such a change, and that any change in the DE rules would require a rulemaking. In the instant petition, Sprint offers a procedurally improper proposal of its own, seeking to undo Congress' judgment through a petition for reconsideration of an order that has nothing to do with the DE rules. Because that effort is merely a thinly disguised attempt to evade the procedural rulemaking requirements of 5 U.S.C. § 553 and the Commission's own regulations, the Sprint/US West petition for reconsideration must be denied.

Discussion

The proposals in the Sprint/US West petition would profoundly alter the nature of the C Block auction in direct contravention of congressional intent. Section 309(j) of the Communications Act imposes a requirement on the Commission to regulate in a way that will "ensure" that small businesses "are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(D). The Commission's primary response to that congressional directive was the formulation of the DE rules. *See In re Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket 93-253, Fifth Report and Order, 9 F.C.C.R. 5532 (1994) ("*Fifth Report and Order*"). The centerpiece of the Sprint/US West proposal is the elimination of those DE rules. As noted in NextWave's earlier filings, the Commission has previously recognized the devastating effect that elimination of those rules would have on the opportunities for small businesses to participate effectively in spectrum auctions: "small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business." *Fifth Report and Order* ¶ 121. In short, adoption of the Sprint/US West proposals would eliminate the opportunity for

small businesses to provide spectrum-based services and would eviscerate the Commission's efforts to meet its statutory obligations. For those reasons, as well as the others articulated in the earlier round of comments, the Sprint/US West petition must be denied.

In this instance, however, the Commission should not reach the merits of the Sprint/US West proposal, because that proposal is procedurally flawed. This is not the first attempt by large wireless providers to eliminate the DE rules: In February, Nextel and SBC filed petitions asking the Commission to waive the DE rules for the scheduled July 26 C Block auction. In its comments on those petitions, Sprint noted that "the Commission may not eliminate a rule through use of its waiver process," and that instead the Commission should "commence a rulemaking proceeding" to evaluate changes to the DE rules. Sprint PCS Comments, DA 00-191 & DA 00-145, at 9 (filed Feb. 22, 2000). A rulemaking proceeding such as the one Sprint then believed necessary is not, however, without costs: the Commission must follow "[t]he policies or ground rules [that] are expressly laid out in the Code of Federal Regulations." US West Comments, DA 00-191, at 12 (filed Feb. 22, 2000). *See generally* 47 C.F.R. §§ 1.411-1.427 (describing requirements for rulemaking proceedings). These regulations generally require the Commission to publish a "Notice of Proposed Rulemaking" that includes, among other things, "the terms or the substance of the proposed rule or a description of the subjects and issues involved." 47 C.F.R. §§ 1.412; 1.413(c). These rules are not mere obstacles for the Commission to circumvent; instead, they "serve important purposes of agency accountability and reasoned decision making." *American Medical Ass'n v. Reno*, 57 F.3d 1129, 1132 (D.C. Cir. 1995).

Apparently unhappy with those ground rules, petitioners now ask the Commission to ignore them. Sprint and US West have filed a "petition for reconsideration" of the *Order on*

Reconsideration of the Fourth Report and Order (“*Reconsideration Order*”),^{1/} purporting to ask the Commission to “reconsider” its recent resolution of a number of minor outstanding auction-related issues. But the Sprint/US West petition does not in fact ask the Commission to reconsider *any* aspect of the *Reconsideration Order*. The *Reconsideration Order* addressed numerous issues – including auction inventory, the controlling interest rule, and minimum opening bids – none of which have the least bit to do with the Sprint/US West proposals. Petitioners attempt to link their proposals to those raised in a petition for reconsideration by Omnipoint Corporation which the Commission addressed in the *Reconsideration Order*. But as the *Reconsideration Order* makes clear, Omnipoint challenged the Commission’s decision to limit the availability of the “grandfather” exception to the DE rules, and thus provides no basis for the Sprint/US West petition for reconsideration, which seeks to eliminate the DE rules themselves.

Notwithstanding petitioners’ half-hearted effort to link their petition to the *Reconsideration Order*, petitioners have actually filed an untimely petition for reconsideration of the Commission’s earlier orders that established the DE rules in the first place. But Commission precedent is clear: efforts to file in a later proceeding what is in essence a petition for reconsideration of an earlier Commission action or order must be dismissed. *See, e.g., In re Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 F.C.C.R. 1463, ¶ 131 (1995); *In re Amendment of Section 73.202(B), Table of Allotments*, MM Docket No.

^{1/} *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, WT Docket 97-82, Order on Reconsideration of the Fourth Report and Order, FCC 00-54 (Feb. 29, 2000).

90-466, FM Broadcast Stations, 13 F.C.C.R. 234, ¶ 8 (1998); *see also In re Commonwealth Tel. Co.*, Memorandum Opinion and Order, 4 F.C.C.R. 5299, ¶ 14 (1989) (“Section 405 of the Act, which we cannot waive, requires that petitions for reconsideration of Commission action be filed within thirty (30) days of the date of the public notice of the action at issue.”); 47 U.S.C.

§ 405(a). Accordingly, because the Sprint/US West petition is in effect an untimely petition for reconsideration of the Commission’s earlier decisions on the DE rules, the petition should be dismissed as beyond the scope of a petition for reconsideration of the *Reconsideration Order*.

CONCLUSION

The petition for reconsideration filed by US West and Sprint should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Wack", is written over a horizontal line.

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April 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of April, 2000, caused a true copy of the foregoing Opposition to be served on the parties listed below:

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